NO. 1080

IN THE

United States

Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

Los Angeles Traction Company. (a corporation),
Plaintiff in Error,
vs.
John Martin Connelly, et al.,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

HARRIS & HARRIS,
B. L. OLIVER,
Attorneys for Plaintiff in Error.
B. F. MILLIKIN,
Of Counsel.

[illegible] & PARKER, Law Printers, 233 New High St., Los Angeles Cal.

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Statement of the Case.

The action is brought to recover damages for injuries resulting in the death of Luke Conneally, father of the plaintiffs. There was a verdict and judgment for the plaintiffs.

The injuries were received Sept. 7th, 1902, in a collision of Conneally's cart with plaintiff in error's electric car at the intersection of Jefferson street and Vermont avenue, in the city of Los Angeles.

The defendant's answer, in addition to denials of defendant's negligence, pleaded contributory negligence, and the questions to be disposed of on the writ of error grow out of this latter defense. The evidence relevant to this issue was as follows:

Early on the evening of the accident Conneally came into the city of Los Angeles to attend a meeting of the Milkmen's Association [Tr., pp. 88, 134]. On his way to the meeting he took one drink of whisky [pp. 134-5]. He was sober at the meeting [pp. 136, 137, 138]. After the meeting, between ten thirty and eleven, he took two [88] and perhaps four [94] glasses of beer; at eleven fifteen or eleven thirty two drinks of whisky [89, 94]. The barkeeper who served these two drinks testified that Conneally's "conduct was all right at that time." A few minutes later he drank at another saloon two small glasses of beer [89, 94]. Immediately after the accident his breath was strong of liquor [pp. 114, 116].

After drinking these two glasses of beer Conneally drove along the north side of Jefferson street [91] toward the place where the accident occurred [95]. He was alone [85] in a heavy two-wheeled cart [96] that made a rattling noise [90], and was drawn by one horse [85], a small one that he had owned for five years, and was accustomed to drive [91]. He was following thirty or thirty-five yards [85], perhaps more [97], behind the two acquaintances with whom he had been drinking, one of whom says they were traveling at about six miles an hour [88].

Shortly after midnight [103, 85] the two vehicles

reached the crossing of Jefferson street and Vermont Ave. [91], which is within the city limits [102]. There was no street light at the crossing [88]. The night was moonless, dark and foggy [88]; one could see about forty yards [86 and bottom of 90].

The car that struck Conneally's cart was going south on Vermont Ave. [103]. That street is straight for half a mile north from this crossing [map, p. 83]. The view up the street to the north is not obstructed to one at the crossing [120, 122]. Of the men in the vehicle ahead of Conneally's, one said he saw no light on the car or from the car till after the accident; that he looked for light and saw none [86, 87]. The other said that "shortly before approaching Vermont, probably thirty or forty feet from the line of the car track," he "glanced right and left and saw no car." [91-2] The motorman [103] and conductor [115], and the motorman on a car approaching from the south [121], say the car was lighted. Several witnesses testified that from the arrangement of the electric circuit and from the fact that other cars on that circuit were lighted, the car in question must have had its lights burning [122, 123, 125, 130].

Conneally's acquaintances heard no sign of the car [86, 92]. The motorman says the gong was sounding [103].

The car was running by gravity at from eight to ten miles an hour down a slight grade [107 and 99]. The conductor says he does not know what the speed was, but admits that he testified at the coroner's inquest that the *usual* speed at that point was from ten to twelve miles an hour [116].

The only eye-witness of the accident was the motorman, who testifies that when the front end of his car was within the lines of Jefferson street, but near the north line, "a single rig came out of the dark," the horse at a gallop, and started across the tracks in front of him [103]. When the motorman saw this "rig" the horse was on the east track [112], the car being on the west track [112], and the horse was six or eight feet from the front of the car [112]. When the car struck the cart the latter was from thirty-four to fifty feet south of the south line of Jefferson street [96, 120]. Conneally was thrown out [112]. His horse stopped with his fore feet on the west curb of Vermont Ave., the shafts were down [93], but he stood quiet, sweaty, and apparently tired [93, 104, 116, 122].

All that the court charged the jury with reference to contributory negligence was as follows:

"The burden of proof rests upon the plaintiffs as to all of said issues, except that of contributory negligence, and as to this last issue the burden of proof rests upon the defendant."

"If, however, you believe from the evidence, that the defendant was negligent in said particulars, or any of them, and. that the death of plaintiff's father was thereby proximately occasioned, you will next inquire whether or not said deceased was guilty of contributory negligence.

"Contributory negligence is such an act or omission on the part of the person injured, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act or acts of the defendant, was the proximate cause of the injury complained of by the plaintiffs, and whether or not said deceased exercised due care and caution before or in crossing or attempting to cross defendant's railway track, is one of the issues submitted for your determination.

"The Court, however, instructs you, in this connection, that it is the duty of an individual before crossing, or attempting to cross a railroad track, to exercise reasonable care in the use of his senses of sight and hearing to ascertain whether or not a car or train is approaching, and, if he fails to exercise such reasonable care, he is guilty of negligence.

"The Court further instructs you, on this branch of the case, that, in the absence of all evidence tending to show whether the deceased, Luke Conneally, stopped, looked, and listened before attempting to cross the west track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and if they find that they do, they should find that he did not stop and look and listen; but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary.

"The jury are the sole judges of the facts and the credibility of the witnesses, and in civil cases, such as the present one, should base their findings on a preponderance of evidence, uninfluenced by sympathy or prejudice for or against either party.

"The jury are not bound, however, to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a legal presumption or other evidence satisfying their minds."

"If you believe from the evidence, that said deceased was guilty of contributory negligence, your verdict will be for the defendant, even though there may have been negligence on the part of the defendant." [pp. 56-9.]

Certain of these instructions were excepted to [pp. 142-5], and certain refusals to instruct as to contributory negligence were excepted to [pp. 147-151]. In order

that these matters might be manifest on the record a bill of exceptions was settled [79], containing these exceptions, which the appellant now makes the basis of its demand for a reversal of the judgment. The instructions so given and refused with the exceptions taken are stated in the following:

SPECIFICATION OF ERRORS.

I.

The Court erred in charging the jury as follows:

The Court further instructs you, on this branch of the case, that, in the absence of all evidence tending to show whether the deceased, Luke Conneally, stopped, looked, and listened before attempting to cross the west track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and if they find that they do, they should find that he did not stop and look and listen; but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary. [Tr. pp. 58, 72, 142, 161.]

II.

The Court erred in charging the jury as follows:

The jury are the sole judges of the facts and the credibility of the witnesses, and in civil cases, such as the present one, should base their findings on a preponderance of evidence, uninfluenced by sympathy or prejudice for or against either party.

The jury are not bound, however, to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a legal presumption or other evidence satisfying their minds. [Tr. pp. 59, 144, 163.]

III.

The Court erred in refusing to give the following instruction requested by plaintiff in error;

You are instructed that a street car and a driver of an ordinary vehicle, each have an equal right to pass along and over that portion of the street occupied by the street car tracks, but with regard to their duty with relation to each other when this equal right comes in conflict, as it is impossible for both to use the same portion of the street at the same time, the circumstances impose different duties upon each. It is the duty of each to use ordinary care and to avoid injury to the other; and it is the duty of the driver of the ordinary vehicle to avoid passing across or along the track immediately in front

of or imprudently near the front of an approaching car and to use ordinary care and to make ordinary careful use of his senses of sight and hearing, under the circumstances surrounding him, and in view of his knowledge of the manner in which said cars are ordinarily operated, when about to go upon the track, and even to stop, if he has an opportunity to do so, and the circumstances apparent to him make it reasonably prudent to do so, in order to perceive whether or not a car is approaching. The neglect of any of these duties by such a driver will constitute negligence on his part; and you are instructed that if the deceased, Luke Conneally, in driving upon the track of the defendant's street railway at the time of the accident mentioned in the evidence, neglected either of these duties, and if you believe, from the evidence that such negligence on the part of said Luke Conneally contributed approximately or directly to cause said accident, that there can be no recovery in this action, and your verdict should be for the defendant. [Tr. pp. 51, 73, 147, 164.]

"Defendant at a proper time duly excepted to the court's refusal to give said instruction and now excepts to said action of the court, for the reason that the substance of said proposed instruction was not, nor was any similar instruction given by the court to the jury, and that there was substantial evidence admitted in the case to which said instruction was applicable." [Tr. 148.]

IV.

The Court erred in refusing to give the following instruction requested by plaintiff in error:

You are instructed that a street railroad track, upon which cars are frequently run, is of itself a warning to any person who has reached years of discretion and who is possessed of ordinary intelligence, that it is unsafe to go upon the track without exercising reasonable diligence in order to be made aware of the approach of cars and thus be enabled to avoid receiving injury; and you are instructed that the failure of such persons, so situate with reference to railway tracks, to exercise ordinary care and watchfulness and to make use of the senses of sight and hearing in order to avoid the damages incident to such situation, is in itself negligent. [Tr. pp. 52, 73, 149, 165.]

V.

The Court erred in refusing to give the following instruction requested by plaintiff in error:

You are instructed that a person about to cross a street railway track is bound to exercise all reasonable care and precaution to avoid injury upon such crossing: in approaching a street railroad track with intention to cross the same, it is incumbent upon such person to exercise reasonable care and caution by looking and listening for any car, which may be approaching, so as to avoid colliding therewith, and if you believe from the

evidence that the deceased, Luke Conneally, failed to exercise such care when about to drive upon the defendant's street railway track, and in consequence of such failure said collision and the injuries suffered by deceased resulted, then you must find for the defendant. [Tr. pp. 53, 73, 149, 166.]

VI.

The Court erred in refusing to give the following instruction requested by plaintiff in error.

You are instructed that it is negligent in law for a person to drive upon the tracks of an electric street railway line where cars are frequently passing, without exercising ordinary care and making ordinary careful use of the senses of sight and hearing in view of existing circumstances and in view of such person's knowledge of the manner in which such cars are operated, to ascertain if a car is approaching so near as to make a collision possible; and I further instruct you that a motorman of a street car is not required to assume that a person will be guilty of an act, largely endangering his life or limb, and that it is not negligent on the part of such a motorman to assume that a person will not attempt to cross the track in front of an approaching car and while it is so near as to render a collision probable. [Tr. pp. 54, 73, 150, 166.]

VII.

THE COURT ERRED IN ITS CHARGE TO THE JURY in that it failed to submit to the jury or direct the jury's attention to the question whether or not decedent exercised ordinary care in any particular other than the use of his eyes and ears for the purpose of discovering any approaching car. [Tr. p. 161.]

ARGUMENT.

As to Specification I. (cute p. 8)

First. It was error to charge the jury that Connealy was presumed to have stopped.

This operated as a surprise to the defendant. It is so extraordinary and unusual for one to stop before crossing a street car track that the defendant would never think of proving that the plaintiff did not stop. To establish that fact would avail the defendant nothing, since the failure to stop is no evidence of contributory negligence in such cases.

Railway Co. v. Whitcomb, 66 Fed. 915.

On the other hand, the jury having to presume that Conneally did take the unusual and extraordinary precaution of stopping, could hardly after that have believed any contributory negligence possible.

If the instruction is good in street car accidents, then it follows that the defendants in such cases must prove that the plaintiff did not stop, and then the court must charge that such proof is of no account because the failure to stop is no evidence of contributory negligence.

In the case of a steam road, it has sometimes been held negligence not to stop, look and listen, and this instruction was copied, as we shall show, from one given in an action against a steam road company. The practical effect of this erroneous instruction was to mislead the jury in answering two questions:

Did the deceased have knowledge of the car's approach in time to avoid the injury?

Did the deceased use ordinary care to avoid injury after he learned that the car was coming?

If one actually stops, looks, listens and finds that a car is coming he is not likely to start up till after the car has passed. Hence the natural conclusion (presuming that Conneally stopped) is that he could not discover the car and went on to the crossing in ignorance of its approach.

On the other hand, but for this erroneous charge, that Conneally was presumed to have stopped, the jury might well have found from the great weight of evidence that the car was lighted; that Conneally undertook to cross ahead of it, put his horse on a run—as the undisputed evidence shows it was [Tr. p. 103]—and took the chance and the risk. And the fact that his cart when struck was from thirty-six to fifty feet [pp. 96, 120] south of the south line of the crossing might fairly indicate that he did see the car and took a diagonal course to cross ahead of it.

And the charge is misleading here, because it was a disputed question whether or not the motorman was sounding his gong. Conneally was riding in a cart that made a rattling noise. Now, if he stopped, he would

certainly have heard the gong if it was sounded; so that this unwarranted presumption was very likely the basis of an inference by the jury that the gong was silent; at least the presumption of stopping, that the jury were told to make very probably determined the disputed question as to the sounding of the gong.

It is true this charge was given only in connection with the defense on contributory negligence and not with specific reference to defendant's negligence; but a jury takes a charge as an entirety, and an error in one part is likely to react prejudicially on other portions.

Second. The charge is erroneous in that it mentions a presumption of the performance of specific acts, whereas the only presumption is the general one of the exercise of care.

"It was contended that the presumption from the instinct of self-preservation was not to be limited to the very instant of going into danger, but that it might be presumed that deceased on leaving the curbing, 17 feet from the car track, looked in the direction from which it was coming and calculated that if the car was approaching at a lawful rate of speed, he would have time to cross the track, and that whether this calculation was reasonable should have gone to the jury, but the presumption of the exercise of the instinct of self-preservation cannot constitute affirmative evidence of the existence of facts prior to and remote from the occurrence of the accident itself. It might as well be presumed that he had been advised by the manager of street car company that no cars would be run on the track that day.

It never has been held that the presumption from the instinct of self-preservation constitutes affirmative proof of any specific act or exercise of any specific care."

Ames v. Transit Co., 120 Iowa 640; 95 N. W. 161.

In none of the cases where the instruction was in form like that given in this case does it appear that attention or criticism was directed to this important particular.

Certainly there can never be a presumption that one did specific acts which the law does not require of them. The presumption of the performance of duty cannot be broader than the duty. And it has been often held that failure to look and listen before crossing a street car track does not *per se* constitute contributory negligence. So held in this court.

Tacoma &c., Ry. Co. v. Hay, 110 Fed. 496.

To say that one is presumed to have exercised due care is very different from saying he is presumed to have done certain acts that may or may not have been, under the circumstances, necessary elements of ordinary care.

Third. It was error to charge that Conneally is presumed to have stopped, looked and listened before attempting to cross the west track.

There were two tracks, the east and the west. Conneally was coming from the east and, of course, crossed the east track first. The plain implication, from the peculiar wording of the charge in connection with the facts, is that Conneally is presumed to have looked and listened after crossing the east track and before attempting the west track—that is, that he stopped, looked and listened immediately before his horse stepped upon the west tracks.

Certainly the usual charge of the presumption of care

before crossing the tracks would have been quite as appropriate here and not liable to misconstruction.

The error arose from following too closely the language of the charge in the case of Baltimore &c. Ry. Co. v. Landrigan, hereinafter more fully discussed. But in that case the specification of the particular track was important, and, in fact, necessary. The complaint in that case alleged that Landrigan was killed by a certain runaway car. The evidence was conflicting as to whether he was killed by that car, and therefore negligently, or by a train, as to the operation of which no negligence was claimed. There were four tracks. The runaway car went along the southerly track, the train along one of the center tracks; Landrigan approached from the south, and therefore, unless he was killed on the first or south track, the defendant was not liable; hence, it was necessary to prove contributory negligence in the crossing of that particular track, and the presumption of care on Landrigan's part applied only to that first or south track.

There are some abstract and stock instructions, like the well known statement concerning reasonable doubt in the Guiteau case, that can be repeated in a thousand cases, but there could not be a better illustration than the present of the danger of copying and repeating an instruction which was carefully prepared to meet a different state of facts.

Fourth. The charge virtually nullified the effect of the evidence as to Connealy's drinking.

There is a presumption that sane men are careful; there is certainly no such presumption as to men insane.

So men in their sober senses are presumed careful, but it is nowhere said, that we can find, that intoxicated men are presumed to have acted with due caution.

The mere fact that a man was drunk may raise no presumption that he was negligent in crossing a street car track, but it certainly destroys any presumption that he was careful. The presumption applies to one in "full possession of his senses."

Ames v. Transit Co., 120 Iowa 640; 95 N. W. 161.

Men in their "sober senses" are presumed to exercise care.

Allen v. Willard, 57 Pa., St. 374.

In the case at bar there was certainly evidence from which the jury might have found that Conneally was, if not drunk, at least considerably stimulated, so as to be careless, if not reckless, at the time of the accident. He had taken two drinks of whisky [Tr., 89, 94], and four [88, 89, 94] or six [89, 94] glasses of beer within an hour and a half, besides one glass of whisky earlier in the evening [134-5]. His breath after the accident was strong of liquor [114, 116]; his horse was on the gallop at the moment of the accident [103], but was evidently not running away or out of control, for it was a small horse that he had owned five years and was used to driving [91], and after the accident the horse stood at the side of the street perfectly quiet, but *sweaty* and tired [93, 104, 116, 122].

Was it fair to defendant to give this instruction of a presumption of care without any qualification recognizing defendant's theory of intoxication?

It appears that this instruction was given at plaintiff's request [143]. Plainly, it was prepared in advance in accordance with what was anticipated rather than with what developed at the trial.

Fifth. The charge was erroneous becouse there was evidence of contributory negligence.

A. *It assumes that there is or may be no such evidence.*

It, in effect, says to the jury: I will tell you what the rule will be in the absence of evidence on this point, for I can see that a reasonable man might, as the case stands, say that there is no evidence of contributory negligence.

It was thus, in this case, exceedingly inapplicable and misleading, for the statement of the case itself shows and it will be shown later in this brief that there was abundant evidence as to contributory negligence; in fact, most of the evidence was directed to that issue.

B. *Where there is evidence of contributory negligence the presumption of care disappears from the case.*

A charge concerning a general presumption of care was introduced in states where the plaintiff had the burden of negativing contributory negligence; and was permitted only as a matter of necessity—that is, when the plaintiff was unable from the nature of the case to produce evidence of due care.

"The origin of the rule as to this presumption is due to the peculiar doctrine that the burden of showing affirmatively freedom from contributory negligence is on the plaintiff, and it was introduced to avoid the in-

justice of that doctrine in cases where there was no evidence one way or the other as to the exercise of care by the injured party, and no such evidence was attainable, by reason of the death of the party injured and absence of any proof as to the circumstances attending the injured. Where there is direct evidence as to the circumstances of the accident, the presumption is not to be entertained."

Ames v. Transit Co., 120 Iowa 640; 95 N. W. 161.

So also in Michigan:

Adams v. Iron Cliffs Co., 78 Mich. 271; 44 N. W. 270.

But in Federal Courts such an instruction is unnecessary and misleading.

It is true that in some jurisdictions where the burden of proof is on defendant, the same instruction has been given.

Penn. Ry. Co. v. Webber, 76 Pa., St. 157.

Moberly v. Ry Co., 98 Mo. 183; 11 S. W. 569.

But it is difficult to perceive why such a charge should ever be given in courts where the burden of proving contributory negligence is on the defendant. It is quite enough to say that such being the burden of proof, the plaintiff is entitled to a finding on that point in the absence of evidence. Why add anything about a presumption?

In the case at bar, the Court imposed on the defendant the burden of proof, and in addition to that, threw in the same scale this presumption, as if it were something more still that must be overcome, and doubtless the jury did believe that no mere preponderance of evi-

dence would suffice to lift both the burden and the presumption, concerning the weight and effect, of which latter they were given no hint, except as they were told the next moment that they need not find according to testimony which failed to produce conviction as against a *legal presumption.*

Where there is evidence as to contributory negligence the case should be decided on the evidence only.

Phila. &c. Ry Co. v. Stebbing, 62 Md. 504.

In Salyers v. Monroe, 104 Iowa 74; 73 N. W. 606, the trial court had charged:

"In considering the question whether the plaintiff was negligent, you will take into consideration his situation and all the facts and circumstances surrounding him at the time, his condition, as to whether he was incumbered with a shovel, his knowledge of the dangerous position of the board, if you find that it was so dangerous and he knew it, the natural instinct of man to guard himself against danger and preserve himself from injury. All these matters should be inquired into by you."

The Supreme Court said the jury was thus instructed to consider the natural instinct of man to guard himself against danger and preserve himself from injury in determining whether he was guilty of contributory negligence. "It is settled that such an instruction may be given where the care exercised by the person at the time of the accident which caused his death is in question and direct evidence as to the care used cannot be had. But, when there is such evidence, the instinct of self-preservation cannot be given any weight by the jury."

In Bell v. Clarion, 113 Iowa 126; 84 N. W. 962, the court instructed the jury that it is a recognized rule of human conduct that persons in their sober senses naturally and instinctively avoid danger. The law, therefore, presumes, until the contrary appears, that the deceased did exercise care, but such presumption would be overcome by evidence that satisfied the minds of the jury that he was negligent. After quoting from previous Iowa cases, the Supreme Court deduces the rule as follows:

"It has been fully settled that in the absence of any direct evidence whatever, the instinct of self-preservation may be considered, but where there is direct evidence as to whether or not the injured party was negligent, then the inference is entitled to but little, if any, weight.

"We suppose that the idea involved in the latter proposition is that the direct evidence as to what took place is of higher character than the mere inference to be drawn from the instinct of self-preservation, and it must be conceded in such case the inference is entitled to but small consideration, if any. The instruction given would revolutionize the doctrine that the plaintiff has the burden of proving freedom from contributory negligence. The court was misled by the ambiguous use of the term 'presumption,' which is frequently used as indicating mere inference which may be drawn from certain facts, and where it has been used in the previous decisions of this court in this connection, it must be so interpreted."

There is a presumption of defendant's negligence in cases against railroad companies for damage from fire. from the mere setting of the fire; but this presumption is wholly eliminated from the case when evidence of due care on the part of the R. R. company has been intro-

duced, and the case must then be decided solely on the evidence for and against, without regard to presumption.

Smith v. Ry Co., 3 N. D. 17; 53 N. W. 173;
Olmstead v. Ry. Co. (Utah), 76 Pac. 557.

And the same is true in actions for killing stock:

Volkman v. Ry. Co., 5 Dak. 69; 37 N. W. 731;
Huber v. Ry. Co., 6 Dak. 392; 43 N. W. 819;
Seaboard, etc., Co. v. Waltham, 117 Ga. 427; 43 S. E. 720.

And the reason is the same that we have urged here; namely, that the presumption, as such, is raised merely of necessity to make out the plaintiff's *prima facie* case.

In the present case there is abundant evidence on which to determine the issue of contributory negligence without resorting to this presumption.

The plaintiff's own undisputed witness said, that although the night was dark and moonless, one could see 40 yards [Tr., p. 86]. Mr. Paggi not only says this expressly, but says that a few moments before the accident he had looked back twice and seen that Conneally was not more than 35 yards in the rear. [Tr. p. 90.] Now, a glance at the map inserted in the transcript [p. 83], which is drawn on a scale of 40 feet to the inch, will show that after Conneally reached the east side of Vermont avenue, driving, as he did, on the northerly side of Jefferson street, he had about 75 feet to go to reach the west car track on Vermont avenue at the point where he attempted to cross. According to the plaintiff's testimony, Conneally was driving at the rate of six miles an hour [Tr., pp. 86 and 88]. According to

the highest rate of speed testified to by any witness, the car approached at ten miles an hour [Tr., p. 106]. During all the time that Conneally was going the 75 feet he had an unobstructed view for half a mile northerly up Vermont avenue. [See map and pp. 122 and 119.] He was in a two-wheeled cart [Tr., p. 96]; during that time, assuming the relative rates of speed of Conneally and the car to be six and ten miles an hour, respectively, the car was less than 130 feet from him, and during most of that time less than 40 yards away and within sight, according to plaintiff's own testimony, so that even if the car was dark it could easily have been seen by Conneally during practically all the time that he was on Vermont avenue.

But there was abundant direct evidence that the car was brilliantly lighted. Paggi is the only man who denies that the car was lighted. The only other witness for the plaintiffs who testified concerning the car did not say whether it was lighted or not. On the other hand, the motorman [Tr., p. 103] and conductor [Tr., p. 115], declare that the car was lighted and that the headlight was burning, and the conductor adds a circumstance which clinches the fact, saying that he was making up his trip sheet at the time of the accident [Tr., p. 115]. The witness Mallery says that he saw the headlight on the car which struck Conneally from the time the car turned the corner of 24th and Vermont until his own car reached the place of the accident after it had occurred [Tr., p. 122]; and several witnesses familiar with the system of lighting the street cars testify that it was practically impossible that the headlight of the car that

struck Conneally was not burning at the time, because the headlight was burning on other cars on the same circuit, all of which lights would have been out had the light on that car not been burning [Tr., pp. 123, 125, 130].

There was also the testimony of the motorman that he was sounding his gong continually for a long distance before the car reached the intersection of Vermont and Jefferson [Tr., p. 103].

Yet in the face of all this direct evidence, the jury were instructed that there was a presumption of care that must be "rebutted" and that it was for the jury to say whether it was rebutted, or, in effect, that they might decide upon a presumption, applicable only in the absence of all evidence.

There is the further circumstantial evidence that Conneally had consumed sufficient alcoholic drink to make an ordinary man somewhat careless and even reckless, to say the least, having had at least three drinks of whiskey, and four, perhaps six, glasses of beer [Tr., pp. 88, 89, 94, 135]. A presumption that applies to men in a normal, sober condition can hardly apply with equal force, if at all, to one who is, to put it mildly, stimulated to the extent to which the evidence shows that Conneally was stimulated at the time of this occurrence.

In this connection, it should be noted that the undisputed evidence is that Conneally's horse was on the gallop when it crossed the east track on Vermont avenue before coming to the west track, where the accident occurred [Tr., p. 103], and that immediately after the accident the horse was standing quiet and apparently tired,

but sweaty, on the curb on the west side of Vermont avenue [Tr., pp. 104, 116, 122].

The Landrigan Case.

Now, since this instruction was approved by the Supreme Court of the United States, in Baltimore, etc., Ry. Co. v. Landrigan, Advance Sheets, Jan. 15, 1904, p. 137, a careful comparison of the facts of that case with those of the present seems to be proper. For we would not assume to criticise a charge so approved, and especially as the opinion was written by the learned Associate Justice, who formerly sat in this court, and is now assigned to this circuit.

In the Landrigan case, the defendant was operating a steam railroad—in this case a street railroad, and the rules concerning contributory negligence differ widely as to the two kinds of railroads. In the Landrigan case there was no eye-witness of the accident—here there was one.

In that case no person saw Landrigan as he approached the tracks, no one was with him or near him; the only means of determining how he was hurt—whether by the train or the runaway car—were such inferences as could be drawn from the position in which he was found.

In that case there was no evidence that the injured man had been drinking; he was walking—Conneally driving. There the question of the defendant's negligence was complicated by the uncertainty as to whether Landrigan was struck on one of the center

tracks by train No. 78, operated with due care, or on the south track by the runaway car that got out of control because of a defective brake. And in that case, the question of contributory negligence was complicated by the dispute whether or not the gates at the crossing were so operated as to give warning of approaching trains at night. There was no question but that the runaway car was lighted, but it was disputed whether or not the light was conspicuous, or even visible at a short distance ahead of the car. And it was not disputed that no warning was given of the car's approach and that it ran without noise. Evidently, instructions that would be proper enough in the Landrigan case might be utterly misleading here.

It would be eminently proper also to consider the particular criticisms and objections that counsel for the railroad company made against this charge in the Landrigan case. For the Supreme Court of the United States is overwhelmed with business, and the Justice who wrote the opinion has a great amount of work to do, so that it can hardly be expected that he would make an independent search for objections to instructions, especially to assist counsel for a great railroad company, supposed to be abundantly able to look out for itself. The charge might be very objectionable even in the case in which it was given upon grounds other than those which were urged against it.

We have not yet at hand the official publication of the case nor the report of the case in the Appellate Court of the District of Columbia, so that we do not know just what points were made against the instruction; but ap-

parently the only objection was that the presumption could not be invoked in any case. The specific reasons against it which we have made, would some of them have been applicable in that case; some of them would not have been. But none of them seem to have been suggested.

Sixth. This charge was especially harmful because followed, and almost immediately, by the following charge:

"The jury are not bound, however, to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds against a less number or against a legal presumption or other evidence satisfying their minds."

Now, the only presumption that can possibly be referred to here is this same one of due care on part of deceased.

The distinction between a presumption and an inference is not always observed by the courts and it may not always be entirely clear. But this seems to be true: that a presumption, whether it be called a presumption of law or a presumption of fact, is something which a jury must take into account and allow to have force and effect, whereas an inference is a conclusion that the jury may or may not draw.

A presumption is a rule that the law establishes; it is not deduced from any evidence in the case. If conclusive, it will shut out all evidence to the contrary; and if not conclusive, it stands without the prop of evidence. It may be the duty of the court, in the absence of evidence, to instruct the jury what in that state of the case

the law presumes. This is ordinarily done in terms of the burden of proof: "The burden of proof under this issue is on defendant, and, in the absence of evidence, you will therefore find for the plaintiff." On the other hand, references are to be made by the jury from the evidence; the absence of evidence cannot be the basis of an inference, for it is an argument, not a rule; a deduction from evidence, not from the absence of evidence. It seems to follow clearly, that a legal presumption, as such, cannot be weighed against evidence as if the presumption (entertained in the absence of evidence) were itself an inference based on evidence.

"It has been said, that presumptions of law derive their force from jurisprudence and not from logic, and that such presumptions are arbitrary in their application. This is true of irrebuttable presumptions, and, primarily, of such as are rebuttable. It is true of the latter until the presumption has been overcome by proofs, and the burden shifted; but when this has been done, then the conflicting evidence on the question of fact is to be weighed and the verdict rendered, in civil cases, in favor of the party whose proofs have most weight, and in this latter process the presumption of law loses all that it had of mere arbitrary power, and must necessarily be regarded only from the standpoint of logic and reason, and valued and given effect only as it has evidential character. Primarily, the rebuttable legal presumption affects only the burden of proof, but if that burden is shifted back upon the party from whom it first lifted it, then the presumption is of value only as it has probative force, except it be that on the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law would settle the issue in favor of the proponent of the presumption.

"Regarded in its evidential aspect, a given presumption of law may have either more or less of probative value, dependent upon the character of the presumption

itself and upon the circumstances of the particular case in which the issue may arise. Some legal presumptions are more probable and inherently stronger than others. So, also, differing circumstances may give differing degrees of probability to one and the same legal presumption."

Graves v. Colwell, 90 Ill. 612.

So we contend here that evidence having been introduced tending to show contributory negligence, the jury ought not to have been instructed in the abstract language used by the court, that a presumption existed which the jury must take into account, but if instructed at all on this point, the jury should have been advised that they were at liberty to infer the existence of ordinary care from what they knew of the instinct of self-preservation, but that they were to give to this inference such weight as they thought it deserved under all the circumstances of the case as developed by the evidence.

The jury were, indeed, told that the presumption could be rebutted, but they were given no intimation as to the amount of evidence required to rebut a presumption, nothing as to the weight of a legal presumption and nothing as to their right to disregard the presumption, if from all facts in the case, they found no room for its existence.

(For instance, if they believed from the testimony that the deceased was drunk at the time of the accident, it can hardly be that they should have given any weight to the presumption of due care.)

In Bell v. Clarion, 113 Iowa 126; 84 N. W. 962, the court had instructed the jury that the law presumes that

the deceased did exercise care. The Supreme Court said:

"The court was misled by the ambiguous use of the term 'presumption,' which is frequently used as indicating mere inference which may be drawn from certain facts, and where it has been used in the previous decisions of this court in this connection, it must be so interpreted. In the present case, the inference to be drawn from the instinct of self-preservation could properly be considered by the jury, and we could not therefore be justified in sustaining the contention of the defendant that there was no evidence of want of consideration. But that is a very different thing from saying to the jury that the presumption arises therefrom, requiring evidence to the satisfaction of the jury to overcome it."

In Phila., etc., Ry. Co. v. Stebbing, 62 Md. 504, the injury occurred to a man who was walking along side a railroad track. The injury was not fatal and the man himself was a witness. The court instructed the jury as follows:

"In considering the question of negligence, it is competent for the jury in connection with the other facts and circumstances of the case to infer the absence of fault on the part of the plaintiff from the general and known disposition of men to take care of themselves and keep out of the way of difficulty and danger."

With respect to this the Court of Appeals said:

"It is certainly true that the motive of self-preservation is a principle of our common nature and it is but rational to presume, in the absence of evidence to the contrary, that parties act under its prompting in view of impending danger. But in such cases as here presented, there is a counter presumption, when the proof does not show to the contrary, and that is that every person charged with a duty involving the safety of himself and others will perform that duty; so that, in fact, it is

not often the case that these mere presumptions afford much assistance in arriving at a correct or just conclusion. They ought not to be indulged to the exclusion of direct evidence to the contrary, and it is only where there is no reliable proof to the contrary, or there is rational doubt upon the evidence as to the acts or conduct of the parties, that such presumption can be invoked. The jury ought not to be instructed in such terms as would justify them in acting upon the mere presumption of the absence of fault in either party, in disregard of the proof in the case, where there are facts and circumstances to be considered by them. The form of instruction in this case is the same as that used in several cases that have come before this court, and where the instruction has been sanctioned, but the propriety of such instructions must always be determined with reference to the nature and state of proof before the jury. It will not do to instruct them that it is competent to them, in connection with facts and circumstances of the case, irrespective of the nature and force of such facts and circumstances, to infer the absence of fault on the part of either the plaintiff or defendant, from the known general disposition of men to avoid danger. Such an instruction in many cases would be exceedingly misleading."

In Home Ins. Co. v. Marple (Mass.), 27 N. E. 633, notice was sought to be proved by the mailing of a letter. The receipt of the letter was denied by the company. The court charged that if the jury found that the letter was mailed, then the presumption of fact * * * is that said letter * * * was received. The Supreme Court said:

"Where the evidence is undisputed upon an essential fact in a case and but one inference may properly be drawn from it, the court may so instruct the jury and to that extent control the verdict; but where the evidence is conflicting, or is of such a character that different inferences might be drawn from it, the question must be

submitted to the jury without interference on the part of the court except to instruct generally upon the law of the case. It is solely the function of the jury to determine the truth of all disputed facts and draw inferences of fact from items of evidence, and it is error for the court to assume to direct the jury in this regard by invading their province and directing the application of the evidence, or what inferences may be drawn from it * * * Depositing a letter in a post office, properly addressed and stamped, is *prima facie* proof that it was received by the person to whom it was addressed in due course of mail, but where its receipt is disputed, the court would not be justified in instructing the jury that the receipt of the letter might be inferred from so mailing it * * *. The inference is one of fact, and where the receipt of the notice is disputed, the question should be submitted to the jury to be determined from all the evidence, both positive and circumstantial, whether the notice was in fact received or not.

Under the latter hypothesis, the court should not instruct the jury what inferences might be drawn from any of the facts in evidence."

In Moberly v. Ry. Co., 98 Mo. 183; 11 S. W. 569, the injury was not fatal and the plaintiff testified. The trial court instructed that the negligence of the plaintiff meant a failure on his part to exercise such care as an ordinarily prudent man would have exercised under the same circumstances, and the law presumes that the plaintiff did exercise such care and the jury cannot find the plaintiff guilty of any negligence unless all the facts and circumstances shown in evidence, taken together, show to the satisfaction of the jury that the plaintiff did fail to exercise such care. The burden of proof is upon defendant to show such negligence on the part of the plaintiff. The Supreme Court says that these instructions should not have been given; that the jury

should not have been told that the law presumed that the plaintiff exercised ordinary care while submitting the question of his care or negligence as an issue. "The presumption that every man exercises ordinary care obtains in the absence of evidence to the contrary, but there was abundant evidence from which plaintiff's negligence might have been fairly found. With that evidence before them, it was calculated to give the jury a wrong impression of its effect to say that a presumption of care then existed in plaintiff's favor. We do not hold that a reference to a disputable presumption would be in all cases erroneous, but we are of the opinion that on the facts here presented, it should not have been made. Where there is evidence tending to remove the presumption, a reference to the latter is to be avoided. The case is a close one on the issue of contributory negligence. Though there was sufficient evidence to support a verdict for plaintiff, the jury should be left to make such finding as they considered just on the issue without casting into the balance such an inference on the presumption obtaining in the absence of evidence."

Mr. Justice Field said in Galpin v. Page, 18 Wall. 350:

"Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averments made."

Lawson, in his book on Presumptive Evidence, Rule 120, says:

"A rebuttable presumption of law being contested by proof of facts showing otherwise which are denied, the

presumption loses its value unless the evidence is equal on both sides, in which case it should turn the scale."

Probably the best discussion of presumptions is in Thayer's Preliminary Treatise on Evidence, Chapter 8; see especially pp. 338-9.

Those cases in which a non-suit or a verdict for defendant has been ordered on the ground of contributory negligence established by circumstantial evidence, also show that the instructions in question were error. For if this presumption of care still persists in the face of evidence and has the effect of evidence as against other evidence, then how could a court ever non-suit a plaintiff in these cases? For there would always be a substantial conflict of evidence created by this presumption.

As to Specification II.

First. It was error to tell the jury they might find in accordance with the presumption of care unless convinced that there was contributory negligence.

This conflicts with the paragraph immediately preceding, telling the jury to find in accordance with the preponderance of evidence and with the charge that to rebut the presumption of care the evidence of want of care must be weightier than that showing care.

That it is error to say to a jury that the evidence for or against such an issue must be convincing is well settled.

Aetna R. I. Co. v. Ward, 140 U. S. 76;
Fidelity M. L. A. Co. v. Mettler, 185 U. S. 308;
Stratton v. Central C. H. R. Co., 95 Ill. 25;
Harnish v. Hicks, 71 Ill., App. 551;
Mitchell v. Hindman, 150 Ill. 538.

Even to charge that "before you can find for plaintiff you must be *convinced by a preponderance of the evidence*" is error.

Brady v. Mangle, 109 Ill., App. 172.

Second. The charge is abstract and misleading in using the term "presumption" instead of telling the jury to take into account their knowledge of men's habits as to avoiding danger.

If the jury had been told in plain words that in weighing the evidence they might take into consideration and give such weight as they thought right to the general instinct of men to avoid danger and to use caution in approaching a place of known possible danger, probably in the Federal Courts no successful objection could have been made. (In most of the State Courts even such a charge would be error. Home Ins. Co. v. Marple (Mass.), 27 N. E. 633.) But how is a jury to guess the force and effect of what is dubbed a "legal presumption" without a word of explanation, something that is delivered to them from the bench as an arbitrary, inflexible rule of law—a legal rule. We have already noted the difference between presumptions and inferences. But it is not a mere matter of words. Whether called "inference" or "presumption," the jury should have been told the *rationale* of the rule so that they might apply it, not as an arbitrary formula, but intelligently, in accord with their view of all the evidence.

As to Specifications III and VII.

In this proposed instruction, the attention of the jury would have been called to the entire duty of one about to go upon a railroad crossing, and especially to the general duty of avoiding the passing across or along a track imprudently near the front of an approaching car, and that is after all the summing up of the duty of one crossing a track.

The theory of the defendant was, that Conneally could and did see and hear the approaching car, but deliberately took the risk of getting across the track ahead of the car. Now, this theory was fully supported by the evidence on the part of the defendant, which was to the effect, as already recited in this brief, that the car was lighted; that the gong was ringing; that even an unlighted car could be seen at a distance of 40 yards; and by the further fact established by the undisputed testimony of the witness Stone, that Conneally's horse was galloping at the moment the car struck the cart, as well as by the fact that the view up the track in the direction of the approaching car was wholly unobstructed. All this fully sustained the defendant's theory that Conneally saw the car, but thought that he had time to pass ahead of it. The defendant certainly had a right to an instruction based on this well supported theory.

The Court of its own motion had instructed first that it was the duty of an individual before crossing to exercise reasonable care in the use of his senses to ascertain whether or not a car is approaching [Tr., p. 58], and had instructed generally that contributory negligence is an act or omission amounting to a want of or-

dinary care [p. 58], but then had proceeded to call specific attention to the duty of stopping, looking and listening, saying that if the evidence rebutted the presumption that Conneally did stop, look and listen, then the jury should find that he did not stop, look and listen; so that there was not only no calling of the jury's attention specifically to this duty of acting cautiously after knowledge of approaching danger, but the jury's whole attention was diverted to the question whether or not Conneally had knowledge of the danger. Plainly, it is not enough that one should use the means in his power to ascertain the existence of danger; this is only preliminary to the use of good judgment after knowledge of the danger is obtained.

And in view of the further fact that Conneally had been consuming a considerable amount of intoxicating drinks, an amount sufficient to warrant the jury in finding that he was not in condition to exercise the best of judgment, it was of the highest importance to the defendant that the jury's attention should be called to this necessity of the exercise of caution in attempting a crossing in the face of known danger.

In the case of Rauscher v. Traction Co., 176 Pa., St. 349, 35 Atl. 138, the court charged the jury as follows:

"Now, in his testimony, he (plaintiff) says he stopped, looked and listened—a precaution which a man is bound to exercise before crossing a crowded thoroughfare, and after he does that, he does his whole duty, and that is all he can be expected to do—to see the streets are in such a condition to make him believe he can safely cross them, assuming that these vehicles were using the proper and ordinary care." The Supreme Court said:

"Under the instruction in regard to his duty, the jury

might have understood, without any misconstruction of the language of it, that although the plaintiff's negligence after he crossed the westbound tracks was the cause of the injury he received, he was still entitled to compensation for it from the defendant, if he stopped, looked and listened before he started across the street. At all events, the jury could not justly be charged with stupidity in so construing it. If the plaintiff had attempted to cross the street without looking to see whether a car was approaching, his act would be considered negligence *per se,* but the fact that he looked and listened before doing so would not excuse his want of ordinary care while he was crossing it."

In the case of Illinois Central Ry. Co. v. Jones, 95 Fed. 370 (see page 390), the court was requested to instruct the jury that the failure to look and listen was contributory negligence, and the court says the instructions are open to the criticism that they sought to single out the fact of failure to look and listen as determining the question of contributory negligence to the exclusion of other facts of equal importance which it was the duty of the jury to consider.

In the case of Rio Grande Western Ry. Co. v. Leak, 163 U. S. 280, the court was requested to instruct as follows: "If the plaintiff saw the cars coming and knew that there was danger of a collision, or by the use of ordinary care could have so seen and known in time to escape therefrom by leaving his wagon, and if, notwithstanding such danger, he remained in his wagon for the purpose of attempting to save his wagon or his horses, then you should not find a verdict in favor of the plaintiff." The court said it was not an error to refuse this instruction. It was liable to the objection that it singled out particular circumstances and omitted all reference to others of importance, and quoting from an earlier case says, "in determining whether the deceased was guilty of contributory negligence, the jury were bound

to consider all the facts and circumstances bearing on that question and not select one particular and prominent fact or circumstance as controlling the case to the exclusion of all others."

In the case of Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, the court was requested to instruct the jury as follows: "If you find that the deceased might have stopped at a point 15 or 18 feet from the railroad crossing and there had an unobstructed view of defendant's track either way, that he failed so to stop, that instead the deceased drove upon the defendant's track, watching the Bay City train that had already passed, and with his back turned in the direction of the approaching train, the deceased was guilty of contributing to the injury." The reason given by the court for refusing this request was that it is too much upon the weight of the evidence and confines the jury to the particular circumstance narrated, without noticing others that they may think important. The court says, "this reason is a sound one; in determining whether the deceased was guilty of contributory negligence the jury were bound to consider all the facts and circumstances bearing upon the question and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all others."

As to Specifications IV, V and VI.

Our objections to these are the same as those urged to Specification III.

We submit that the judgment ought to be reversed.

Dated September 19, 1904.

HARRIS & HARRIS,
B. L. OLIVER,
Attorneys for Plaintiff in Error.

E. E. MILLIKIN,
Of Counsel.